FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

78-616

ROBERT MARKUS PETITIONER

v.

PHILIP ROSS
as Industrial Commissioner
of the State of New York

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

ROBERT MARKUS
350 CANAL ST
NEW YORK N.Y. 10013
pro se

OCTOBER 2, 1978

INDEX

Determinations, Opinions, Judgments	2
Jurisdiction	2
Question Presented	3
Constitutional Provision Involved	3
Statement of Facts	3
Reasons for Granting the Writ	11
Conclusion	17
APPENDICES	
Department of Labor Determinations and Decisions	A
Appellate Division Decisions	B
Court of Appeals Decision	C

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The petitioner, Robert Markus, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York rendered July 13, 1978, and the decisions of the Unemployment Insurance Appeal Board set forth below.

DETERMINATIONS, OPINIONS, AND JUDGMENTS

The Court of Appeals decision to dismiss, sua sponte, rendered July 13, 1978.
The Appellate Division decision to deny reargument rendered May 18, 1978.
The Appellate Division decision to affirm the Unemployment Insurance Appeal Board decisions, rendered March 23, 1978.
A decision of the Unemployment Insurance Appeal Board dated January 25, 1977.
A decision of the Unemployment Insurance Appeal Board dated November 24, 1976.
The decision of the referee, dated August 9, 1976.
The determinations of Unemployment Insurance Local Office 511, dated May 13 and May 18, 1976.

JURISDICTION

This petition was filed less than 90 days from the date of the Court of Appeals decision. The jurisdiction of this court is invoked under rule 19 (b) of the rules of the court, 1970.

QUESTION PRESENTED

The question which arose in appeal of the determinations is:

Whether the discretionary power and duty of the Industrial Commissioner to determine who is an employer and who is an employee was being abused when the Referee and the Appeal Board and the New York State Appellate Division upheld the Local Office determinations without a hearing upon any proposition of the law upon which the determinations themselves must ultimately be based, thereby inflicting a penalty violative of the prohibition of attainder by the U.S. Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 9, U.S. Constitution:

"No bill of attainder or ex post facto law shall be passed"

STATEMENT OF FACTS

I. The Local Office.

1. The claimant wrote in his application and stated in his interview before an

eligibility examiner that he is "engaged in (any) activity that brings in or may bring in income."

2. The claimant, after several months of total unemployment, reported one day of "temporary, self employed" activity to a claims examiner, and on a form provided by the Local Office claimed partial unemployment for the week.

3. The claimant received a check from the Department of Labor for three/fourths of the ordinary amount for that week.

4. The claimant reported one day of "temporary, self employed" activity to a claims examiner, and on a form provided by the Local Office claimed partial unemployment for the week following 2,3. supra. He was interviewed by two claims examiners and told to sign a summary of interview statement by the second. He was told to leave his claims book with the claims examiner.

5. The claimant received a determination of ineligibility in the mail, retroactive to the date of application (1.supra), and extrapolating two years into the future.

6. The claimant contested the determination and asked the Local Office supervisor for a hearing; and also that the hearing be combined with another hearing which was to be held, at which the claimant's former employer, Harry Macklowe Inc. intended to prove that Robert Markus, the claimant, had not been its employee.

7. Claimant received an amended determination of ineligibility in the mail.

8. Claimant received notification that Harry Macklowe Inc. no longer contested the Department of Labor ruling that Robert Markus had been its employee.

II. The Hearing.

1. A hearing was held at which the referee questioned a representative of the Industrial Commissioner and the claimant. The representative stated that the basis for the determination of ineligibility was the final claims interview (4.supra). The claimant read from a prepared statement, copies of which were not accepted by the referee and the representative. The referee, to whom all remarks were addressed by both parties during the hearing, inter-

rupted that statement of precedent and question of law, to state

> "Please don't read anymore, because everything you're reading is damaging against you."

The claimant protested

> "I would like to disagree with you and go on if I may"

and was allowed to go ahead.

2. The claimant received by mail a copy of the referee's adverse decision.

NOTE: A copy of the referee's decision and copies of the determinations of the Local Office appear in appendix A.

III. The Appeal Board.

1. The appeal board was mailed a copy of the prepared statement (Hearing, II.1, supra) and a further notarized statement which concludes as follows

> "Since I did not change my activities between 12/1/75 and 5/12/76 it is the state's position regarding my activities which was changed. I attempted to raise questions regarding the state's interpretations of law at the hearing which were ignored in the decision of 8/9/76. I disagree that these questions are damaging to my claim, and a notarized brief which was refused at the hearing on 7/29/76 is included for consideration."

2. The appeal board upheld the referee and the Local Office.

3. The claimant asked the appeal board to reconsider its decision, with a request which began as follows

> "There has been an abuse of discretion in the lack of substantiation of fact by the state that my activity during the year 1975 was as an employer within the meaning of its statute, and since this is not merely an academic issue, I request the opportunity to present a new oral argument to the appeal board, and that the appeal board order reconsideration of its decision."

4. The claimant received a copy of the appeal board's revised and final decision.

NOTE: Copies of the appeal board decisions appear in appendix A.

IV. The Appellate Division.

1. Acting under a provision of the Labor Law which allows Appellate review of appeal board decisions, the claimant based an appeal to the Appellate Division upon the same question of law which had been raised at the hearing:

the definition of the term "employment" in sections 511.1, 522, and 591.1 of Article 18.

2.The state's response brief asserted that the matter of employment had been decided as one of fact, and was not subject to review except as to whether there was substantial evidence to support that fact. Then, citing law and precedent, the use of the term "employment" was limited to Section 522, in which it

> "means any employment including that not defined in this title"

3. The claimant made reply in an appellant reply brief that an abuse of discretion with respect to the lack of specific correlation of fact with statute existed, and that a decision adverse to the claimant would raise a substantial issue of law that the right of a claimant to collect benefits provided by law was abridged by a procedure avoiding both common law and reasonable discretion.

4. The Appellate Division found in favor of the Industrial Commissioner, without opinion.

5. The claimant requested the Appellate

Division grant permission to reargue, on the basis that the hearing was unfair, due process was denied, and there was no opportunity to challenge the Labor Department construction of the law.

6. The request was denied, without opinion.

NOTE: The decisions of the Appellate Division appear in appendix B.

V. The Court of Appeals.

1. Claimant applied to the Court of Appeals for review as of right,

> "the constitutional right of every free-lance hourly worker to a consistent,clear set of rules governing unemployment benefits"

Citing a new provision of New York statute, the application reiterated the question of the limit of discretion:

> CPLR 5501.9, McKinney, 1978ed.
> An exercise of "discretion" is ordinarily in the fact realm and beyond the powers of the Court of Appeals to review. But if the exercise of this discretion is beyond all permissible borders as perceived by the Court of Appeals, it qualifies as an "abuse of discretion" which is a reviewable question of law. It is in that situation that one finds the Court of Appeals from time to time

addressing itself to "discretionary" points"

2. The Clerk of the Court indicated a possible sua sponte rejection.

> "From the papers submitted it does not appear that constitutional questions were presented to or necessarily decided by the Court below"

The Clerk invited jurisdictional comments.

3. The claimant requested clarification of the Clerk's remarks, in view of the opinion of the learned Justice Louis Brandeis that

> "in every case involving a statute, the state courts must perform (aside from the consideration of any constitutional questions) two functions essentially different. First the court must construe the statute; that is, determine its meaning and scope. Then it must apply the statute, as so construed, to the facts of the case." Dahnke-Walker Milling Co. v. Bondurant 257 U.S.282.

and that

> "The validity of an authority is not drawn in question where the controversy is confined to determining whether the facts upon which a person can exercise that authority do or do not exist."(ibid.)

but that an abuse of discretion is an abuse of authority.

4. The claimant submitted jurisdictional

comments to the court.

5. The court dismissed the appeal sua sponte.

NOTE: The decision of the Court of Appeals appears in appendix C.

REASONS FOR GRANTING THE WRIT

This is a question which is being brought before the Supreme Court of the United States as demonstrably special and important, involving a principle which is the thesis of our federal polity. That central principle is the separation of power into legislative, executive, and judicial authority, the abuse of which may be defined as attainder. The question has arisen out of a dispute between a claimant and the Commissioner of the Department of Labor of the State of New York, over the eligibility for unemployment insurance benefits. The Unemployment Insurance Act, otherwise known as the New York State Labor Law, Article 18, created a program of social welfare, now funded by state and federal taxes, providing compensation in the event of total unemployment.

All recipients of unemployment insurance compensation in the United States have a "property" interest in the benefits which is protected by the U.S. Constitution (Steinberg v. Fusari, 415 U.S. 912). Yet, this case differs from Steinberg v. Fusari and all the unemployment insurance eligibility cases already heard by federal courts, in one qualitative respect. In those cases, the unemployment insurance hearing and appeal procedures served to arbitrate between an alleged "aggrieved employer" and an alleged "aggrieved employee". In this case the adversaries are an alleged "self-employed person" and the Department of Labor. In this case the Department of Labor spontaneously alleged and "determined" ineligibility upon its own authority and without reference to precedent or law, or for that matter a thorough investigation, viewing only the facts at hand. The hearing served only to review the sufficiency of the facts at hand to support the conclusion. The attorney for the industrial commissioner was representing the claims examiner who made the determinations and the authority of the Department of Labor to make "rules or orders"(re. which see column A, following).

Matter of Electrolux Corp. 286 N.Y. 390	Cummings v. Missouri 71 U.S. 277
"In the same subdivision of section 523 in which the duty to determine the amount of the contribution due from an employer is imposed upon the Commissioner the statute provides for an appeal from "any other rule or order of the Commissioner under any provision of this Article". By clear implication the statute confers upon the Commissioner authority to make other rules or orders appropriate to the performance of the duties imposed by any provision of the statute. A grant of power to an administrative officer may not be read into a statute by doubtful implication, but the statute here confers upon the Commissioner by necessary implication both power and duty to determine the persons who are employers and the persons who are employees within the meaning of the statute, in order that the amount of contributions due from an employer may be fixed, and the statute does not restrict the discretion of the Commissioner in respect to how or	"A bill of attainder is a legislative act which inflicts punishment without judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties. In these the legislative body, in addition to its legitimate functions exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of

when a rule or order shall be made determining a controversy in that field."

New York Labor Law: Art.18
622.2
Evidence and Procedure

"At a hearing held as herein provided, evidence may be offered to support a determination, rule, or order, or to prove that it is incorrect. The appeal board and the referees, in hearings and appeals under any provision of this article, shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties."

The New York Legislature has given the chief executive of the Department of Labor power to make rules or orders appropriate to the performance of his duties, and an unrestricted discretion with regard to determining a controversy in that same field. The Legislature has given the power of hearing an appeal of a determination to officers who are to consider proof; nowhere are they given the

authority to consider the question of the basis of a determination in law. In effect, the authority to construe and enforce the law as written rests with the executive discretion of the Commissioner and his administrative representatives. But the Supreme Court has decided that the legislative exercise of such authority is in violation of the U.S. Constitution, Art.1, sec.9, and the legislative assignment of judicial authority to an administrator of its law is no less a violation of the Constitution. That the courts of New York do not review discretionary constructions is due to an unfortunate set of precedents which make all decisions which have been through the Department of Labor appeal procedure to review "total unemployment" appear as fact, which, the Industrial Commissioner argues, is sufficient as proof unless there is substantial evidence to the contrary. The courts, as recent authority continues to point out, are rarely disposed to review the record to find a question of law which has not been certified.

I am cognizant of the various uses of the discretionary power in and out of government, as well as the discretionary applications of

"due process" itself. Moreover, I am aware of the reasons why the Constitution was ordained and established in 1787, and of the abuses which the free persons of the thirteen states would thereby not be required to endure. I recognize that the intent of the founding fathers is to place the proscription of attainder under the aegis of the judiciary: ergo, ArtIII sec.3. And since I find that my power to argue a question of law and precedent of the occasional worker, known commonly as "free-lance", and his ability to obtain unemployment benefits during periods of temporary but nonetheless total unemployment (see Bunzl v. Lubin, New York 1955 1AD2d46) has been peremptorily preempted by the Industrial Commissioner, who obtains his absolute and unquestioned authority to construe the law and impose penalties by "necessary implication" from the legislature, I, acting in my own behalf, present this request for a ruling upon the constitutional question set forth above.

I would argue, with the permission of the Court, that there is a limit to the exercise of discretion by an administrator, a limit visible from the point of a recognized pale

of judicial authority, and that it is in the common interest to resolve the question before the court at this time.

CONCLUSION

If the Court has found any justification for the argument that Article I Section 9 of the Constitution has been correctly brought out as paramount in this case, I respectfully request the Court to issue a writ of certiorari to review the judgment of the New York Court of Appeals and the decision of the Unemployment Insurance Appeal Board.

Respectfully submitted,

Robert Markus

Robert Markus, petitioner
350 Canal St
New York N.Y. 10013

October 2, 1978

78-616

Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

APPENDICES

APPENDIX A

OCTOBER TERM 1978

ROBERT MARKUS

v.

PHILIP ROSS

Text of the
NOTICE OF DETERMINATION TO CLAIMANT

May 13, 1976

1. NOTICE OF DETERMINATION OF INELIGIBILITY
You are not eligible for unemployment insurance benefits for the period and reason indicated by the box that is checked. /X/ Beginning December 1, 1975 and until the reason for your ineligibility no longer exists You are not totally unemployed. The determination is based on the following: You are self employed as a lighting consultant.

2. NOTICE OF DETERMINATION OF OVERPAYMENT AND REQUIREMENT FOR REPAYMENT
As a result of the above determination, you have been overpaid $913. This overpayment is recoverable and must be repaid because You were paid on incorrect information.

3. NOTICE OF DETERMINATION OF WILFUL MISREPRESENTATION
It is determined that on dates 12/10 12/14, 12/24, 12/31, 1/7, 1/14, 1/21 1/28, 2/4, 2/11, 2/18, 2/25, 3/10, 3/17 3/24, 3/31, 4/7, 4/14, 4/21, 4/28, and 5/5/76 you wilfully made false statements to obtain benefits. Therefore your right to further benefits between now and 5/4/78 (when this penalty expires) is reduced by 83 effective days. This penalty is imposed because: You certified to being totally unemployed when you knew that you were self employed as a lighting consultant

P. Weinsler
Claims Examiner
FOR THE INDUSTRIAL COMMISSIONER

Text of the Determination dated May 18, 1976

In connection with your claim for unemployment insurance benefits please refer to the box(es) checked below:

/2/. The determination dated stating you are ineligible for unemployment insurance benefits beacuse of wilful misrepresentation only is withdrawn. The other determinations issued on that date remain in effect. + Your hearing request on these other issues is being processed.

FOR THE INDUSTRIAL COMMISSIONER
By: P. Weinsler

TEXT OF THE REFEREE'S DECISION
Mailed and duly filed August 9, 1976

FINDINGS OF FACT: A hearing was held at which claimant and a representative of the Industrial Commissioner appeared and testified.

By initial determination effective December 1, 1975, claimant was ruled ineligible because he was not totally unemployed. He was overpaid $913 and the overpayment was ruled to be recoverable. His rights to future benefits were reduced by 83 effective days for wilful misrepresentations; but that determination was withdrawn at the hearing by the Industrial Commissioner's representative.

Claimant, admittedly, a lighting consultant in the theater industry and a member of a union associated with such industry, filed a valid original claim for benefits effective December 1, 1975. On the basis of claimant's employment as a building superintendent, which employment ended November, 1975, claimant was awarder a benefit rate of $44 weekly. He received regular weekly benefit

payments at his weekly benefit rate from December 14, 1975 through May 2, 1976, totalling $913. He indicated in his insert booklet on April 29 that he had been employed that day. In the following week on May 7, he further indicated employment. As a result of such indicated employment, claimant was required to refile an additional claim effective May 4, at which time claimant indicated that his last date of employment was April 29, 1976, and his reason for separation from employment was due to the employment being temporary.

Claimant further listed himself as self-employed. At the local insurance office interview held on May 12, claimant stated, "I have had my own business as a lighting consultant for three years at the listed premises where I was formerly employed as a building superintendent. Although my mailing address is at 350 Canal Street. I cannot estimate how much time I devoted to the business. I spend some time every day. When I filled out the various refiling forms, I wrote "self-employed". I am referring to work that I do for a particular client for which I will be paid."

At the Referee hearing, claimant testified that the only employment he had was on the two days that he had indicated that he had been employed in his insert booklet and named the employer for whom he worked. He further testified that he spends two to four hours each day looking for employment as a lighting consultant, which was the type of employment that he did the two days he stated he was employed.

OPINION: Although claimant, at the hearing, attempted to refute his statement made at the local insurance office that he had been conducting self-employment in his own business as a lighting consultant for three years, at the specific address at which he still maintains a lease, and attempted to narrow and confine such employment to merely two days during the period in question, it is significant that the claimant, who was told to produce books and records relating to his business as a lighting consultant and tax returns for 1975 to date, did not present such required documentation at the hearing. Claimant's statements made at the local insurance office regarding his self-employment and his testimony submitted at the hearing

establishing that he daily devotes substantial time in an endeavor to maintain his business establishes that claimant, during the period involved, was not totally unemployed and is, therefore, ineligible to receive benefits. The benefit payments claimant received totalling $913 constituted a recoverable overpayment because such benefit payment was obtained although claimant was not totally unemployed. Since the issue of wilful misrepresentation has been withdrawn by the Industrial Commissioner's representative, that issue is academic and need not be ruled on.

DECISION: The initial determination ruling claimant ineligible because not totally unemployed is sustained. The overpayment is recoverable.

GEORGE HENDERSON
Referee

TEXT OF THE DECISION OF THE APPEAL BOARD
mailed and filed in the Department of Labor
on NOV 24 1976

The claimant appeals from the decision of the referee filed August 9, 1976 sustaining the initial determinations of the local office holding him ineligible to receive benefits effective December 1, 1975 because he was not totally unemployed and charging him with an overpayment of $913 in benefits, ruled to be recoverable.

A hearing was held before the referee at which all parties were accorded a full opportunity to be heard and at which the claimant and a representative of the Industrial Commissioner appeared and testimony was taken. The Board considered the arguments contained in claimant's written statement submitted on appeal.

After a review of the record including testimony and evidence adduced before the referee and due deliberation having been had thereon, and having found that the referee's findings of fact and opinion are fully

supported by the record, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the opinion of the referee as the findings of fact and the opinion of the Board.

DECISION: The decision of the referee is affirmed.

JAMES R RHONE, Member
G. DOUGLAS PUGH, Member

TEXT OF THE DECISION OF THE APPEAL BOARD
mailed and filed in the Department of Labor
on JAN 25 1977

The claimant applies, pursuant to Section 534 of the Law, to reopen and reconsider the decision of the Board filed November 24, 1976 (Appeal Board 232,819) affirming the decision of the refereee filed August 9, 1976 sustaining the initial determinations of the local office holding him ineligible to receive benefits effective December 1, 1975 because he was not totally unemployed and charging him with an overpayment of $913 in benefits, ruled to be recoverable.

Upon due consideration of the entire record herein, and

After due deliberation having been had on the claimant's application to reopen and reconsider the Board's prior decision, as aforesaid, now, therefore,

Based on the record and testimony in this case and on all of the proceedings heretofore had herein, the Board makes the following

FINDINGS OF FACT: The claimant filed an original claim for benefits effective December 1, 1975. His last employment as a building superintendent had terminated under non-disqualifying circumstances. Since about 1973, he has been self-employed as a lighting consultant for galleries and employed as a lighting technician for motion picture productions. He conducted this business from a studio, located at a different address than his residence. At least until mid-January, 1976, he maintained a telephone answering machine to monitor his calls to the telephone number listed at the address of his studio. He spent about two to four hours per day in efforts to obtain bookings for his consultant business. He also sought employment as a set construction worker through a union of which he is a member, although he has not passed a qualifying examination given by the union for this position.

The claimant marked his calendar insert with "N"'s, indicating that he had done no work at all, for every day from December 1, 1975 through May 12, 1976, except for April 29th and May 7, 1976. For those two days, he indicated that he did some work as a lighting consultant; he advised the local office that he was required to supply his own equipment. He received $913 in benefits during this period. He refiled for benefits on May 5, 1976, stating that he last worked on April 29, 1976 and was "self-employed".

The notice of hearing advised the claimant to produce his books, records, and tax returns. The referee did not request him to present any of these documents at the said hearing.

OPINION: The credible evidence establishes that the claimant performed services in furtherance of his own business as a lighting consultant and technician. He contends that the usual method of obtaining "employment" in this occupation is to establish a free-lance consulting business, he hired on an individual project basis, and to submit itemized bills for labor and expenses. He maintained a separate business address for his studio and utilized a telephone answering machine to monitor calls to his business telephone number. He spent from two to four hours per day in this business, trying to obtain bookings. His contention that this is the usual method of obtaining employment in this industry is without merit. Even if this

is the sole method of rendering services for compensation in the industry, the claimant was unquestionably seeking customers for his business and was not seeking employment. Accordingly, he was not totally unemployed on any effective day during the period in issue.

The claimant received $913 in benefits, which is an overpayment because he was not eligible to receive them. The benefits were paid on the basis of his false certification that he had done no work at all. These statements were factually false because he had done work in furtherance of his own business on every day. Accordingly, the overpayment is recoverable.

DECISION: The claimant's application to reopen and reconsider the decision of the Board filed November 24, 1976 (Appeal Board 232,819) is granted and the same decision is hereby rescinded.

The initial determinations of the local office are sustained.

The decision of the referee is affirmed.

JAMES R. RHONE, Member
HARRY ZANKEL, Member

APPENDIX B

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

March 23, 1978 NOT FOR PUBLICATION

32417- In the Matter of the Claim of
ROBERT MARKUS, Appellant.

PHILIP ROSS, as Industrial
Commissioner, Respondent.

Decision affirmed, without costs.
No opinion.

MAHONEY, P.J., SWEENEY, KANE, STALEY, JR.,
and LARKIN, JJ., concur.

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

May 18, 1978

32417- In the Matter of the Claim of
ROBERT MARKUS, Appellant.
PHILIP ROSS, as Industrial Commis-
sioner, Respondent.

Motion for reargument or, in the
alternative, for permission to
appeal to the Court of Appeals,
denied, without costs.

MAHONEY, P.J., SWEENEY, KANE, STALEY,
and LARKIN, JJ., concur.

APPENDIX C

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of July A.D. 1978

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 Mo. No. 731 SSD 47
In the Matter of the Claim for Benefits under Article 18 Labor Law, made by Robert Markus, Appellant,

Philip Ross, as Industrial Commissioner, Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Clerk of the Court Joseph W. Bellacosa